***THE HON'BLE MR JUSTICE L.NARASIMHA REDDY**

-

-

W.P.NO.24788 OF 2004

% 04.03.2005

-

Between:

M/s. New Gayathri Wines, Kadapa Road, Mydukur, Kapada District, rep., by its Licensee – B.N.Venkata Subbaiah, S/o. Pedda Rama Subbanna, aged about 34 years, R/o. Mydukur, Kadapa District.

..... PETITIONER

AND

The Deputy Commissioner of Prohibition and Excise, Kurnool and another.

.....RESPONDENTS

! COUNSEL FOR PETITIOENR: MR. P.Gangaiah Naidu for Mr. N.Bharat Babu

^ COUNSEL FOR RESPONDENTS: GP for Prohibition and Excise

< Gist:

> Head Note:

? CITATIONS: Nil

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE FOURTH DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE L.NARASIMHA REDDY

WRIT PETITION NO : 24788 of 2004

Between:

M/s.New Gayathri Wines, Kadapa Road, Mydukur, Kadapa District,
rep., by its Licensee-B.N.Venkata Subbaiah, s/o Pedda Rama Subbanna, aged about 34 years, r/o Mydukur, Kadapa District.

... PETITIONER

AND

1 The Deputy Commissioner of Prohibition and Excise, Kurnool.
2 The Prohibition & Excise Superintendent, Kadapa,

Kadapa District.

...RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an order or direction more particularly one in the nature of writ of mandamus, declaring the action of the respondents in not releasing the duty paid liquor seized on 27-08-2001 or its value, as illegal, impermissible and contrary to law and also declare that the entire proceedings relating to the alleged confiscation are vitiated in view of violation of the mandatory provisions under section 46 and section 46(A) to (F) of the A.P.Excise Act and further declare that the respondents are under obligation to release the duty paid liquor seized on 27-08-2001 or its value in the interest of justice.

Counsel for the Petitioner: MR P.Gangaiah Naidu for MR.N.BHARAT BABU

Counsel for the Respondents: GP FOR PROHIBITION & EXCISE

The Court at the stage of admission made the following:

THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY

W.P.NO.24788 OF 2004

JUDGMENT:

The petitioner was granted an IL-24 licence for the excise year 2000-01, for establishing a retail wine shop at Mydukur. On the allegation that certain bottles of non-duty paid liquor were found with the petitioner, Crime No.109/ 2001-2002, was registered by the Inspector of Prohibition and Excise. It was tried as C.C.No.198 of 2002 by the Court of II Additional JFCM, Proddatur. The quantity of alleged non-duty paid liquor as well as the entire stock of duty paid liquor was seized from the petitioner. In the month of November, 2001, the duty paid liquor was sold and the sale proceeds thereof being Rs.1,70,614/-, were deposited into the Treasury. Even while the criminal case was pending, the licence of the petitioner was cancelled, through order dated 01-01-2001.

2. Petitioner filed W.P.No.2129 of 2002. The order of cancellation was set aside, on

the ground that the petitioner was not given an opportunity of being heard. Thereafter the 2nd respondent passed an order dated 09-09-2003, cancelling the licence. Petitioner filed W.P.No.21333 of 2003. The same exercise of filling of writ petitions, quashing of the order of cancellation, on technical grounds, came to be repeated on two more occasions. The last of the writ petitions was W.P.No.13678 of 2004, which was allowed on 17-11-2004. The matter appears to have rested with that, as of now.

3. C.C.No.198 of 2002 ended in acquittal, of the petitioner, on 29-06-2004. The petitioner submitted representation to the 2nd respondent, for release of the stock, of duty paid liquor seized from him, on 27-08-2001, in view of his acquittal in criminal case. The representation was rejected by the 2nd respondent through his order dated 23-11-2004. It was stated that since the stock was confiscated, the question of releasing the same does not arise.

4. In the counter affidavit, the facts, in relation to initiation of prosecution against the petitioner as well as the orders of cancellation passed, from time to time, are narrated. It is stated that an order of confiscation was passed by the 1st respondent way back on 23-10-2001, and in that view of the matter, the question of releasing the stock or payment of the sale proceeds does not arise.

5. Sri P.Gangaiah Naidu, learned Senior Counsel appearing for the petitioner submits that the petitioner was subjected to harassment with the repeated cancellation of licence, for as many as four times, in spite of the same, having been set aside by this Court. He contends that once the allegation of possession of non-duty paid liquor was not held proved, and the petitioner was acquitted of the charge framed against him, the respondents are under obligation to release the seized stock. He submits that there did not exist any basis for the seizure, much less the confiscation. He contends that Sections 45 and 46 of the Act would get attracted, if only the petitioner was held to have committed an offence punishable under the provisions of the Act. He also submits that the so-called order of confiscation is non-existent, and was never communicated to the petitioner, much less he was given an opportunity of being heard by the 1st respondent.

6. Learned Government Pleader for Prohibition and Excise submits that the proceedings before a criminal Court, on the one hand, and those before the 1st

respondent are different, and that the acquittal in a criminal case does not entitle a licensee to seek refund of the confiscated goods or the value thereof. It is her case that, as long as the order of confiscation stands, the petitioner cannot seek refund of the stock, or the sale proceeds.

7. On the basis of an allegation that certain non-duty paid liquor bottles were found with the petitioner, Crime No. 109/2001-02 was registered against the petitioner, under the relevant provisions of the Act. It was tried as C.C.No.198 of 2002, in the Court of II Additional JFCM, Proddatur. Apart from the said proceedings, the licence of the petitioner came to be cancelled, initially, on 01-01-2001. The petitioner had to file as many as four writ petitions being W.P.Nos.2129 of 2002, 21333 of 2003, 7478 of 2004 and 13678 of 2004, against the orders of cancellation, that came to be passed one after the other, afresh, on being remanded by the orders in the writ petitions. It is not necessary to refer to them, in detail. The fact remains that the petitioner has been doing the business on the basis of the renewals granted from time to time and no order of cancellation is passed against him, after W.P.No.13678 of 2004 was allowed.

8. C.C.No.198 of 2002 ended in acquittal of the petitioner through judgment dated 29-06-2004, of the trial Court. It was in this context, that the petitioner made a representation for return of the confiscated stock of liquor. He was not aware of the fact that the seized liquor was sold and the sale proceeds were deposited. The 2nd respondent considered the representation and passed an order dated 23-11-2004, rejecting the representation of the petitioner. The basis for the same is that the seized stock was confiscated by the 1st respondent, through his order dated 23-10-2001.

9. Section 45 of the Act provides for confiscation of certain things, whenever an offence is found to have been committed. It is beneficial to extract the said provision.

> **"Sec. 45**: **Liability of certain things to confiscation**:-- Whenever any offence has been committed, which is punishable under this Act, following things shall be liable to confiscation namely:
>
> 1. any intoxicant, materials, still, utensil, implements or apparatus in respect of or by means of which such offence has been committed;
> 2. any intoxicant lawfully imported, transported, or manufactured, had in possession, sold or bought along with, or in addition to, any intoxicant liable to confiscation under clause

(1); and

3. any receptacle, package, or covering in which anything liable to confiscation under clause (1) or clause (2) is found, and the other contents, if any, of such receptacle, package or covering and any animal, vehicle, vessel, raft or other conveyance used for carrying the same;"

Section 46 provides for an order of confiscation to be passed by the Deputy Commissioner of Prohibition and Excise, in respect of the goods or things seized or detained and are liable to be confiscated under Section 45. It would be sufficient, if sub-section (1) of Section 46 is extracted:

> "**Sec.46(1): Confiscation by Excise Officers in certain cases**:--Notwithstanding anything contained in this Act or any other law for the time being in force, where anything liable for confiscation under Section 45 is seized or detained under the provisions of this Act, the Officer seizing and detaining such property shall, without any unreasonable delay, produce the said seized property before the [Deputy Commissioner of Prohibition and Excise] who has jurisdiction over the area".

10. Section 46-A mandates that no confiscation of any property shall be made under Section 46, unless the affected person is put on notice. Section 46-D is another provision, which had a bearing on the initiation of criminal proceedings before a Court, on the one hand, and confiscation of material by the Officers of the Excise Department, on the other hand. It reads as under:

> "**Sec.46-D**: **Order of Confiscation not to interfere with other punishments**:--The order of confiscation under sub-section (2) of Section 46 or Section 46B shall not prevent from initiation of criminal proceedings against the accused under this Act. The result of criminal proceedings either acquittal or conviction or otherwise under the provisions of the Act, will have no bearing on the order of confiscation passed under this Act".

Section 46-E bars the jurisdiction of any Courts, to adjudicate upon the seizure and confiscation.

11. Learned counsel for the parties have not placed before this Court any precedent, touching on the inter-relation of Sections 45, 46 and 46-D. However, it may be observed that Section 45, which constitutes the basis for confiscation, mandates that the confiscation shall follow, only when it emerges that an "*offence has been committed*". Confiscation is treated as the consequence of proof of commission of an

offence. The question as to whether an individual has committed an offence would emerge, only after the competent Court of law determines the same. But, the purport of Sections 46 and 46-D is that the confiscation can be ordered in a parallel set of proceedings, before the Deputy Commissioner of Prohibition and Excise, even before any order is passed by a Court to the effect that an offence was committed in respect of the seized and detained properties. It is rather difficult to reconcile or give full effect to Section 45 of the Act, on the one hand, and Sections 46 and 46-D, on the other hand.

12. It would have been a different thing altogether, had the Act empowered the confiscation, as an independent, administrative measure. That is not so. The only basis for confiscation is Section 45, and the said provision mandates that, confiscation is to follow an order, holding that an individual has "*committed an offence*" punishable under the Act, and the power in this regard is conferred on the regular Criminal Court. An harmonious way of interpreting these provisions would, to hold that, once an order emerges from criminal Court, holding that an individual committed an offence, punishable under the Act, the property involved therein can be confiscated by the Deputy Commissioner of Prohibition and Excise. Providing for confiscation of the material even before the allegation against the person from whom the goods are seized, is proved, and further directing that the confiscation ordered by Deputy Commissioner of Prohibition and Excise would not be effected, by the result of the criminal case, initiated against such person, would sound abnormal. It needs to be noted that Section 46 does not provide for any confiscation, independent of Section 45. In fact, it specifically refers to Section 45. However, this Court does not intend to delve into that issue, since it is not specifically raised.

13. It has already emerged that the criminal case filed against the petitioner ended in acquittal. The only ground, on which the return of the seized goods or the sale proceeds thereof, is denied to the petitioner, is that the 1st respondent passed an order of confiscation dated 23-10-2001. Reference to this order was made only in the counter affidavit, but not in the impugned order. If there exists a valid order of confiscation, the petitioner cannot get any relief, unless such an order is set aside.

14. In the instant case, the order of confiscation is said to have been passed on 23-10-2001. It was not stated as to whether the copy of the same was served upon the petitioner,

at all. For the first time, the copy of the order is made available, in the Court. The entire text of the order reads as under:

"***PROCEEDINGS OF THE DEPUTY COMMISSIONER OF PROH. & EXCISE, KURNOOL***

PRESENT: SRI N.DASARATHA, M.A.,

R.C.No.B2/2154/2001 Dated:23.10.2001.

Sub:- Proh.& Excise Station Proddutur - Confiscation of seized case Property – Orders issued – Reg.

Read:- Report of the Proh. & Excise Inspector, Proddutur, Dt:14.10.2001.

-oOo-

O R D E R:

Under Sec.13(2) of A.P. Prohibition Act, 1995, the case property of Proh. & Excise Station Proddutur seized in Cr.No.109/2001-2002, dated: 27.8.2001 mentioned in the enclosed statement, is hereby confiscated to the state.

As the property is duty paid and recovered from a licensed shop M/s New Gayathri Wines, F.1.24 Mydkur, the Proh. & Excise Inspector, Proddatur is directed to sell the property to any licensee at A.P.B.C.I. rates and remit the amount into Government account and furnish the remittance particulars to this office.

Deputy Commissioner of

Proh. & Excise, Kurnool.

Encl: Annexure

To

The Proh. & Excise Inspector, Proddutur

Copy to the Sub-Divisional Proh. & Excise Officer, Jammalamadugu."

15. Copy of the order was not marked to the petitioner at all, much less, served upon him. There is no reference to any show cause notice, much less, to any explanation. Inasmuch as the proceedings under Section 46 are punitive in nature, entailing in confiscation of the goods, the 1st respondent is under obligation to issue notice of hearing, in addition to show cause notice, indicating the reasons for confiscation. The only provision mentioned in the said order is Section 13(2) of the Prohibition Act 1995. That Section prohibits manufacture and other related activities of intoxicants, except with licence. It does not provide for confiscation. Even in a case where a show cause notice is served and the person to whom it is issued, does not respond, the 1st respondent is under obligation to discuss the matter, on merits, and record reasons, in support of the order of confiscation. If punitive steps, such as, confiscation can be permitted, on the strength of such orders, as the one extracted above, the entire procedure prescribed by law stands reduced to a dead-letter. The so-called order does not deserve any recognition in law, at all, for the reason that, it does not accord with the basic requirements of law, nor the provisions of the Act and the Rules made thereunder. From the record, it is evident that, even the respondents were not aware of this, and it was pressed into service only at the time of the filing of the counter affidavit. Hence, the said order has to be treated as nonest, in law.

16. The prosecution undertaken on the allegations of commission of offences under the Act, is not an empty formality. It is impermissible in law for anyone, much less to the State, to contend that, irrespective of the result of the prosecution, the accused has to suffer for the same charge. Once the case has ended in acquittal, in favour of the petitioner, the allegation against him stands wiped out. There does not exist any other basis for seizure of the duty paid liquor from the petitioner. With the acquittal in the criminal case, the petitioner acquires a right to seek return of the duty paid liquor, which was seized from him. The state did not choose to prefer an appeal against the order of acquittal. Hence, it cannot withhold the seized goods or the sale proceeds thereof.

17. Hence, the writ petition is allowed, and the respondents are directed to pay the petitioner, the sale proceeds of the stocks seized from him on 27-08-2001, within a period of four weeks from the date of receipt of copy of this order. There shall be no order as to costs.

_____

L. NARASIMHA REDDY, J.

Dt. 04–03-2005.

Note:

L.R. copy to be marked.

(B/O)

KO

To

One fair copy to the Hon'ble Sri Justice L.Narasimha Reddy

(For his Lordship's kind perusal)

1 The Deputy Commissioner of Prohibition and Excise, Kurnool.
2 The Prohibition & Excise Superintendent, Kadapa,

Kadapa District.

3 Two C.Cs. to the Govt.Pleader for Prohibition & Excise,

High Court buildings, Hyderabad (OUT)

4 The Under Secretary, Ministry of Law, Justice and Company

Affairs, Union of India, New Delhi.

5 The Secretary, A.P.Advocates' Association, Library,

High Court buildings, Hyderabad.

6 8 LR copies.

7 Two C.D. copies.